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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9 JUSTIN ALLEN DAVEY,

10                   Plaintiff,

11                   v.

12 PIERCE COUNTY COUNCIL, et al.,

13                   Defendant.

14                   Case No. C21-05068-JCC-SKV

15                   ORDER DIRECTING ADDITIONAL  
16                   BRIEFING ON DEFENDANTS'  
17                   MOTIONS TO DISMISS

18                   This is a 42 U.S.C. § 1983 prisoner civil rights action. In his amended complaint, Plaintiff  
19                   alleges the plumbing and sewer conditions in his unit (Mental Health Unit 3 North A) at Pierce  
20                   County Jail caused sewage backups in the toilets in his cells and ongoing serious sanitation issues.  
21                   Plaintiff contends the conditions of confinement at the Jail violated his Fourteenth Amendment due  
22                   process rights. Plaintiff indicates he was a pretrial detainee at the time of the events giving rise to  
23                   his claims. Defendants have filed two motions to dismiss under Fed. R. Civ. P. 12(b)(6) arguing  
Plaintiff has failed to state a claim. Dkts. 33, 36. The motions to dismiss appear to the Court to  
be identical. *Id.*

As a pretrial detainee, Plaintiff has the right to be free from punishment under the  
Fourteenth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). In assessing conditions of

1 confinement for pretrial detainees, the Court considers whether the conditions amount to  
 2 punishment, causing harm or disability significantly exceeding or independent of the inherent  
 3 discomforts of confinement, or whether they merely result from some legitimate governmental  
 4 purpose. *See Doe v. Kelly*, 878 F.3d 710, 714, 720 (9th Cir. 2017). The Court evaluates a  
 5 pretrial detainee's Fourteenth Amendment claim under an objective deliberate indifference  
 6 standard. *See Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) (applying  
 7 objective standard to medical care claims and describing similar treatment afforded medical care  
 8 and other conditions of confinement claims) (citing *Kingsley v. Hendrickson*, 576 U.S. 389, 135  
 9 S. Ct. 2466, 2475, 192 L. Ed. 2d 416 (2015), and *Castro v. County of Los Angeles*, 833 F.3d  
 10 1060, 1070 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 831, 97 L. Ed. 2d 69 (2017)).<sup>1</sup>

11       A pretrial detainee must demonstrate a defendant's acts or omissions were objectively  
 12 unreasonable, and identify objective facts indicating the "challenged governmental action is not  
 13 rationally related to a legitimate governmental objective or that it is excessive in relation to that  
 14 [objective]." *Kingsley*, 576 U.S. at 398. The elements of a pretrial detainee's claim against an  
 15 individual defendant under the objective deliberate indifference standard are as follows:

16           (i) the defendant made an intentional decision with respect to the conditions under which  
 17 the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of  
 18 suffering serious harm; (iii) the defendant did not take reasonable available measures to  
 19 abate that risk, even though a reasonable official in the circumstances would have  
 appreciated the high degree of risk involved—making the consequences of the  
 defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused  
 the plaintiff's injuries.

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20       <sup>1</sup> Previously, "all conditions of confinement claims, including claims for inadequate medical care, were  
 21 analyzed under a subjective deliberate indifference standard whether brought by a convicted prisoner  
 22 under the Eighth Amendment or pretrial detainee under the Fourteenth Amendment." *Gordon*, 888 F.3d  
 23 at 1122-23 (citing *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242-43 (9th Cir. 2010)).  
 Although the Ninth Circuit has not expressly extended the objective deliberate indifference standard to all  
 pretrial detainee conditions of confinement claims beyond a denial of medical care, failure-to-protect, and  
 excessive force claims, the decision in *Gordon* strongly suggests it will do so. *See Gordon*, 888 F.3d at  
 1120, 1124, and 1124 n.2 (citing *Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017) (extending objective  
 deliberate indifference standard to all pretrial detainee conditions of confinement claims)).

1     *Id.* at 1125. “With respect to the third element, the defendant’s conduct must be objectively  
 2 unreasonable, a test that will necessarily ‘turn[ ] on the facts and circumstances of each particular  
 3 case.’” *Id.* (quoting *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc)  
 4 (quoted sources omitted)). The Ninth Circuit has explained that the objective deliberate  
 5 indifference standard,

6         differs from the inquiry under the Eighth Amendment which requires that the “prison  
 7 official must *subjectively* have a sufficiently culpable state of mind.” *Id.* at 1070–71  
 8 (quoting *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002)  
 9 (emphasis in original) ). “A prison official cannot be found liable under the Eighth  
 10 Amendment for denying an inmate humane conditions of confinement unless the official  
 knows of and disregards an excessive risk to inmate health or safety.” *Estate of Ford*, 301  
 F.3d at 1050 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128  
 L.Ed.2d 811 (1994) ). By contrast “a pretrial detainee need not prove those subjective  
 elements about the officer’s actual awareness of the level of risk.” *Castro*, 833 F.3d at  
 1071.

11     *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125, n. 4 (9th Cir. 2018).

12         In their motions to dismiss, Defendants initially acknowledge that the Ninth Circuit has  
 13 strongly suggested that the objective deliberate indifference standard should be applied to pretrial  
 14 detainee conditions of confinement cases. *See* Dkt. 36, at 4. However, Defendants motions  
 15 subsequently set forth the subjective deliberate indifference standard and appear to analyze  
 16 Plaintiff’s claims under that standard. *See* Dkts. 33, 36, at 6. Given this disparity, the Court  
 17 directs Defendants to submit additional briefing on its motions to dismiss specifically addressing  
 18 Plaintiff’s claims under the objective deliberate indifference standard. The Court also directs  
 19 Defendants to address why they have filed two seemingly identical motions to dismiss and  
 20 whether it is appropriate for one of the motions to be withdrawn or stricken. Dkts. 33, 36.

21         Accordingly, it is hereby ORDERED:

22             1)         On or before **November 17, 2021**, Defendants shall clarify to the Court  
 23 whether their motions to dismiss, Dkts. 33, 36, are in fact identical and whether it is appropriate

1 for Defendants to withdraw one of the motions or for the Court to strike one of the motions as  
2 duplicative.

3           2) On or before **November 17, 2021**, Defendants are directed to submit  
4 additional briefing on their motion(s) to dismiss, addressing Plaintiff's claims under the objective  
5 deliberate indifference standard described above.

6           3) On or before **November 29, 2021**, Plaintiff may file a response to  
7 Defendants' additional briefing.

8           4) On or before **December 3, 2021**, Defendants may file a reply.

9           5) The Clerk is directed to re-note Defendants' motions to dismiss, Dkts. 33,  
10 36, to **December 3, 2021**.

11           The Clerk is directed to send copies of this order to the parties and to the Honorable John  
12 C. Coughenour.

13           Dated this 28<sup>th</sup> day of October, 2021.

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16           S. KATE VAUGHAN  
17           United States Magistrate Judge  
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